No. 17-130

IN THE
Supreme Court of the United States

RAYMOND J. LUCIA, ET AL.,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF CONSTITUTIONAL AND ADMINISTRATIVE LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF AFFIRMANCE

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who teach or have taught courses in constitutional and administrative law and whose scholarship has devoted significant attention to the separation of powers, including Article II's Appointments Clause.

A full listing of *amici* appears in the Appendix.

SUMMARY OF ARGUMENT

The Securities and Exchange Commission (SEC) is an independent agency tasked by Congress with regulating the nation's securities markets. To assist the five-member Commission with its myriad responsibilities, Congress has permitted the Commission to "delegate, by published order or rule, any of its functions to . . . an administrative law judge." 15 U.S.C. § 78d-1(a). Administrative law judges (ALJs) are civil servants who are hired through a competitive process. *See* Vanessa K. Burrows, Cong. Research Serv., RL34607, *Administrative Law Judges: An Overview* 2-4 (2010). Although the Commission has chosen to delegate the tasks of holding hearings and drafting initial decisions in agency adjudications to ALJs, it has retained the authority to review any initial decision *de novo*, and no ALJ initial decision becomes binding without an express order of the Commission.

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

Petitioners challenge the method by which ALJs are hired, arguing that ALJs are "Officers of the United States" under the Constitution's Appointments Clause, and that they therefore must be appointed by the President, a Court of Law, or the Head of a Department, rather than through a competitive hiring process. *See* U.S. Const. art. II, § 2, cl. 2. Petitioners' argument distorts the meaning of the Appointments Clause, contravenes over two centuries of practice, and threatens substantial disruption to the federal government's operations.

As this Court has emphasized, the Appointments Clause "is among the significant structural safeguards of the constitutional scheme," *Edmond v. United States*, 520 U.S. 651, 659 (1997), guarding against "congressional encroachment" and "ensur[ing] public accountability," *id.* at 659-60, by "preventing the diffusion of the appointment power," *Freytag v. Comm'r*, 501 U.S. 868, 878 (1991). Yet at the same time the Framers sought to accomplish these goals, they also sought to ensure that Congress would have flexibility in crafting the structure of the government and who works within it. *See* U.S. Const. art. I, § 8, cl. 18. This flexibility is apparent in the Appointments Clause's text, which grants Congress power to "vest the Appointment of . . . inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments," as Congress "think[s] proper." *Id.* art. II, § 2, cl. 2. Moreover, as this Court has long recognized, the vast majority of federal government employees are "lesser functionaries" who fall outside the Appointments Clause's scope and whose method of appointment Congress has substantial discretion to determine. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 506 n.9 (2010).

Congress has exercised this flexibility from the first days of the Republic to the present, consistently choosing to imbue some federal employees with significant responsibilities without requiring them to be appointed in the manner prescribed for constitutional "Officers of the United States." The First Congress, for example, passed statutes that created such positions as deputy marshal and customs inspector; these officials had important responsibilities, but were not appointed by the President, a Court of Law, or the Head of a Department. Notably, these early non-Officer employees shared many characteristics with modern ALJs: they assisted Officers with important statutory responsibilities, but they were always agents of, and therefore subordinate to, those Officers.

In 1946, with the growth of the modern administrative state, Congress passed the Administrative Procedure Act (APA) and created the position of hearing officer—the antecedent to today's ALJ—to assist federal agencies with their myriad regulatory and adjudicative responsibilities. *See* Pub. L. No. 79-404, § 11, 60 Stat. 237, 244. Though hearing officers, and subsequently ALJs, had the significant responsibilities of holding hearings and drafting initial decisions, agencies retained the sole authority to issue final, binding orders, and so ALJs themselves were not considered to be "Officers of the United States." *See generally Attorney General's Manual on the Administrative Procedure Act* 83 (1947) ("*Attorney General's Manual*") (noting that under the APA, an agency "is in no way bound by the decision" of a hearing officer and "retains complete freedom of decision—as though it had heard the evidence itself").

Despite these numerous examples dating back to the nation's birth, Petitioners insist that ALJs must be constitutional "Officers" because of their "substantive

and procedural powers that require the exercise of broad discretion," Pet'rs Br. 21. But the Appointments Clause is not concerned with "day-to-day discretion." *Bandimere v. SEC*, 844 F.3d 1168, 1197 (10th Cir. 2016) (McKay, J., dissenting). After all, "it is an everyday occurrence in the operation of government for staff members to conceive and even carry out policies for which duly appointed or elected officials take official responsibility." *Andrade v. Regnery*, 824 F.2d 1253, 1257 (D.C. Cir. 1987). Rather, to decide whether an employee is an "Officer," courts must engage in a case-by-case inquiry that asks whether the employee is "exercising significant authority" in his or her own right, or is rather a "lesser functionar[y] subordinate to officers," *Buckley v. Valeo*, 424 U.S. 1, 126 & n.162 (1976), who supervise that employee and will be held accountable for that employee's actions.

At every turn, ALJs are lesser functionaries subordinate to, and subject to the control of, the SEC. Though ALJs conduct hearings, their "initial decision[s]" are not final, let alone binding, *see* 17 C.F.R. § 201.360(a)(1) & (d), and any ALJ "decision becomes final" only "upon issuance of [an] order" by the Commission, *id.* § 201.360(d)(2). Moreover, the Commission reviews the initial decisions of ALJs *de novo*, Pet. App. 91a, and may, "[u]pon its own motion or the motion of a party, . . . allow the submission of additional evidence," 17 C.F.R. § 201.452. Finally, because only orders of the Commission have any binding effect, only orders of the Commission may form the basis of a challenge in an Article III court. *See* 15 U.S.C. § 77i(a). For all these reasons, ALJs are not constitutional "Officers," and they need not be hired in the manner prescribed by the Appointments Clause.

Were this Court to conclude otherwise, the disruption to the operations of the federal government could

be substantial, throwing into question the constitutionality of merit-based hiring for thousands of ALJs and non-ALJ administrative judges in other agencies, as well as other civil servants with significant responsibilities.[2] After all, if the linchpin of Petitioners' analysis is the mere existence of day-to-day responsibility and discretion—without taking into consideration whether employees are agents of, or subordinate to, Officers—their theory would seemingly encompass a large portion of the federal workforce. Such a profound expansion in the category of constitutional "Officers" would not only contravene longstanding precedent and practice, it would also undercut the Appointments Clause's goal of accountability by encouraging *pro forma* appointments. That cannot be right.

ARGUMENT

I. CONGRESS ENJOYS BROAD AUTHORITY TO SHAPE THE STRUCTURE OF THE FEDERAL GOVERNMENT, INCLUDING THE DISCRETION TO DETERMINE HOW TO APPOINT FEDERAL EMPLOYEES SERVING AS AGENTS OF, OR SUBORDINATE TO, OFFICERS.

1. When the Framers drafted the Constitution, they gave Congress broad flexibility to determine how best to shape the federal government. Although the Constitution presupposes the existence of federal "Departments," *see* U.S. Const. art. II, § 2, cl. 1, it does not specify what those Departments are, how they are to be organized, or who is to work within them. Likewise,

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[2] *Amici* use the term "civil servants" colloquially to refer to federal government employees hired based on merit, as opposed to political Officers.

while the Framers recognized that there would be "Officers of the United States" whom the President must appoint with the advice and consent of the Senate and "inferior Officers" whose appointment Congress could "vest . . . in the President alone, in the Courts of Law, or in the Heads of Departments," *id.* art. II, § 2, cl. 2, they did not specify in detail the characteristics that distinguish principal Officers from inferior Officers, or inferior Officers from other employees of the federal government.

This decision to leave open most questions about the structure of the federal government was no accident. The Constitutional Convention specifically rejected a plan that would have delineated in the Constitution itself the roles of specific executive departments. *See* 2 *The Records of the Federal Convention of 1787*, at 335-36 (Max Farrand ed., 1911) (proposal specifying duties of six department secretaries). Instead the Framers gave Congress the authority to "make all Laws which shall be necessary and proper for carrying into Execution the . . . Powers vested by this Constitution in the Government of the United States." U.S. Const. art. I, § 8, cl. 18.

The Necessary and Proper Clause "is the one and only provision of the Constitution that directly addresses the establishment of the federal government," and it "gives the relevant power expressly to Congress." John F. Manning, *Separation of Powers As Ordinary Interpretation*, 124 Harv. L. Rev. 1939, 1986 (2011). Under the Constitution, therefore, "Congress has plenary control over the salary, duties, and even existence of executive offices," *Free Enter. Fund*, 561 U.S. at 500, wielding broad authority over the structure of federal agencies and the Officers and employees who work within them.

2. Of course, Congress wields this power to shape the government subject to constitutional requirements, including the Appointments Clause. *See Buckley*, 424 U.S. at 138-39. But in giving Congress flexibility, the Framers also gave it considerable discretion to determine how the new government's functionaries would be selected.

The Appointments Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for and which shall be established by Law." U.S. Const. art. II, § 2, cl. 2. Yet it allows Congress to "by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.* Moreover, this Court has long recognized that "[one] 'may be an agent or employ[ee] working for the government and paid by it . . . without thereby becoming its officer[].'" *United States v. Germaine*, 99 U.S. 508, 509 (1878); *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (Marshall, C.J.) ("Although an office is 'an employment,' it does not follow that every employment is an office.").

To determine whether any given employee is an "Officer," this Court has insisted on a case-by-case inquiry that examines whether a given administrative structure grants that employee significant authority in his or her own right, or instead makes him or her subordinate to, or an agent of, an "Officer." In *Buckley*, for example, this Court identified an "Officer" as "any appointee exercising significant authority pursuant to the laws of the United States," 424 U.S. at 126, but also made clear that "lesser functionaries" who act

"subordinate to officers of the United States" are non-Officers and not subject to the Appointments Clause's requirements, *id.* at 126 n.162. Other decisions have articulated additional relevant features, such as whether the positions involve the "exercise [of] significant discretion," final decision-making power, *Freytag*, 501 U.S. at 881-82, "continuing and permanent" duties, or regular payment, *Germaine*, 99 U.S. at 511-12.

In the 1879 decision *United States v. Germaine*, this Court held that civil surgeons appointed by the Commissioner of Pensions "to make the periodical examination of pensioners which are or may be required by law, and to examine applicants for pension" were not "Officers" under Article II. 99 U.S. at 508 (quoting Act of March 3, 1873, ch. 234, 17 Stat. 576). In reaching that conclusion, this Court considered the "occasional and intermittent" nature of a civil surgeon's duties and the fact that Congress did not require that civil surgeons be appointed in conformity with Appointments Clause procedures. *Id.* at 511-12. Importantly, the Court also underscored that the surgeon is "but an *agent* of the commissioner . . . to procure information needed to aid in the performance of [the commissioner's] own official duties." *Id.* at 512 (emphasis added). Indeed, the Court noted that "[t]he surgeon is only to act when called on by the Commissioner of Pensions in some special case, as when some pensioner or claimant of a pension presents himself for examination." *Id.* Thus, despite the civil surgeons' significant responsibilities in helping to determine who could receive a pension, their status as agents of the Commissioner meant they were not constitutional "Officers." *Id.*; *see United States v. Mouat*, 124 U.S. 303, 307 (1888) (reaffirming *Germaine*).

Because "lesser functionaries" who act as agents of, and subordinate to, Officers are not themselves constitutional Officers, this Court has long recognized that non-Officers make up the vast bulk of the federal workforce. In 1878, the Court posited that "nine-tenths of the persons rendering service to the government undoubtedly" fell into this non-Officer category, *Germaine*, 99 U.S. at 509, and the Court recently noted that "[t]he applicable proportion has of course increased dramatically since [then]," *Free Enter. Fund*, 561 U.S. at 506 n.9.

This view that "lesser functionaries" who act "subordinate to officers of the United States" are non-Officers not only has a long vintage in this Court's precedents, it is also reflected in practices dating back to the nation's birth, as the next Section discusses.

II. THROUGHOUT THE NATION'S HISTORY, CONGRESS HAS GRANTED SIGNIFICANT RESPONSIBILITIES TO NON-OFFICERS SO LONG AS THEY ACTED AS AGENTS OF, OR SUBORDINATE TO, OFFICERS.

As this Court has repeatedly reaffirmed, "'[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions' regulating the relationship between Congress and the President." *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)); *see McCulloch v. Maryland*, 17 U.S. 316, 401 (1819) (courts "ought to receive a considerable impression" from "the practice of the government").

Recognizing this, Petitioners place weight on examples in which Congress has required seemingly low-level federal employees to be appointed in conformity with the Appointments Clause. *See* Pet'rs Br. 17-18.

But "the Appointments Clause does not prevent Congress from treating a position that is not, in the constitutional sense, an office under the United States as nevertheless subject to statutory restrictions on offices or officers." *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 116 (2007); *cf. Weiss v. United States*, 510 U.S. 163, 182 (1994) (Souter, J., concurring) (Congress may "decline[] to adopt the less onerous appointment process available for inferior officers" and instead require them to be "appointed in the manner of principal officers").[3] For that reason, the positions for which Congress has required Article II appointment procedures are less indicative of the Appointments Clause's scope than positions for which Congress has *not* required Article II appointment procedures.

It is therefore noteworthy that from the early days of the Republic through the modern era, Congress has assigned significant responsibilities to some federal employees *without* requiring that they be appointed via the Appointments Clause. In all of these areas, the employees acted as agents of, or subordinate to, other Officers and were therefore not considered to be "Officers of the United States" despite the significance of their day-to-day responsibilities.

1. The First Congress created "deput[ies]" for numerous public officials and assigned these deputies significant responsibilities as agents of their principals, yet did not require that they be appointed in the manner required by the Appointments Clause. *See*

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[3] For example, although most of the more than 240,000 active military officers are inferior Officers under the Appointments Clause, they are appointed in the manner of principal officers because Congress concluded that such appointment was preferable as a policy matter. *Weiss*, 510 U.S. at 182 (Souter, J., concurring).

Harmelin v. Michigan, 501 U.S. 957, 980 (1991) (opinion of Scalia, J.) ("actions of the First Congress" are "persuasive evidence of what the Constitution means").

For example, the First Judiciary Act of 1789 created the position of "marshal" for each judicial district and empowered the marshal "to appoint as there shall be occasion, one or more deputies, who shall be removable from office by the judge of the district court, or the circuit court sitting within the district, at the pleasure of either." An Act to Establish the Judicial Courts of the United States, ch. 20, § 27, 1 Stat. 73, 87 (1789). These deputies were, like marshals themselves, "bound for the faithful performance" of the marshal's duties—namely, "to attend the district and circuit courts when sitting therein," "to execute throughout the district, all lawful precepts directed to him," and "to command all necessary assistance in the execution of his duty." *Id.* Moreover, deputies—like marshals—were required to take an oath of office that they would "faithfully execute all lawful precepts directed to the marshal of the district . . . under the authority of the United States, and true returns make, and in all things well and truly, and without malice or partiality, perform the duties of the office of marshal (or marshal's deputy, as the case may be)." *Id.* Finally, the Act provided that "in case of the death of any marshal, his deputy or deputies *shall continue in office*, unless otherwise specially removed; *and shall execute the same* in the name of the deceased, until another marshal shall be appointed and sworn." *Id.* § 28, 1 Stat. at 87 (emphasis added).

As the statute says, then, the deputy to a U.S. marshal was given significant responsibility to carry out all of the marshal's statutory duties and even took over the marshal's role upon his death until a successor was

appointed. Moreover, the First Judiciary Act referred to the "marshal's deputy" as an "office" with "duties," required deputies to take an oath of office, and permitted a deputy marshal to be removed only by district court judges. *Id.* § 27, 1 Stat. at 87. Despite the significance of the deputy marshals' authority, however, the statute provided that they be appointed by the marshal himself, not the President, a Court of Law, or the Head of a Department. *See Steele v. United States*, 267 U.S. 505, 508 (1925) ("The deputy marshal is not in the constitutional sense an officer of the United States" despite being "engaged in serving all sorts of writs, and . . . called upon to exercise great responsibility and discretion in the service of some of them, in dealing with the person and property of individuals and in the preservation of their constitutional rights.").

Similarly, the First Congress created various customs officers known as collectors, naval officers, and surveyors, and provided for these Officers to appoint their own deputies who were not themselves considered to be Officers. *See* An Act to Regulate the Collection of the Duties Imposed by Law on the Tonnage of Ships or Vessels, and on Goods, Wares and Merchandises Imported into the United States, ch. 5, § 1, 1 Stat. 29, 29-30 (1789). A 1790 statute provided "[t]hat every collector, naval officer and surveyor, in cases of occasional and necessary absence, or of sickness, and not otherwise, may respectively exercise and perform *their several powers, functions and duties*, by *deputy* duly constituted under their hands and seals respectively, for whom in the execution of the trust they shall respectively be answerable." An Act to Provide More Effectually for the Collection of the Duties Imposed by Law on Goods, Wares and Merchandise Imported into the United States, ch. 35, § 7, 1 Stat. 145, 155 (1790)

(emphasis added). Furthermore, the Act provided that "in the case of the disability or death of a collector, the duties and authorities vested in him shall devolve on his deputy . . . for whose conduct the estate of such disabled or deceased collector shall be liable." *Id.* § 8, 1 Stat. at 155.

Given that deputies were empowered to "exercise and perform" the powers of collectors, naval officers, and surveyors at certain times, it is notable that collectors, naval officers, and surveyors had significant power and responsibilities. For instance, collectors were, among other things, empowered to

> receive the entry of all ships and vessels, and of all the goods, wares and merchandise imported in such ships or vessels, together with the original invoices thereof; to estimate the duties payable thereon, and to endorse the same on each entry; to receive all monies paid for duties, and to take all bonds for securing the payment of duties; [and] to grant all permits for the unlading and delivery of goods, to employ proper persons as weighers, gaugers, measurers and inspectors at the several ports within his district.

Act to Regulate the Collection of the Duties, ch. 5, § 5, 1 Stat. at 36–37. Naval officers were empowered "to receive copies of all manifests, to estimate and record the duties on each entry made with the collector, and to correct any error made therein, before a permit to unlade or deliver shall be granted; [and] to countersign all permits and clearances granted by the collector." *Id.* § 5, 1 Stat. at 37. And surveyors were empowered, among other things, to "superintend and direct all inspectors, weighers, measurers and gaugers within his district, and the employment of the boats which may be provided for securing the collection of the revenue;

to go on board ships or vessels arriving within his district, or to put on board one or more inspectors, . . . and to examine whether the goods imported are conformable to the entries thereof." *Id.*[4]

Even though the deputies to these customs officers were authorized to "exercise and perform [the principal's] several powers, functions and duties" in the principal's sickness, absence, disability, or death, An Act to Provide More Effectually for the Collection of the Duties, ch. 35, § 7, 1 Stat. at 155, they were appointed by their principals, not the President, a Court of Law, or the Head of a Department.

These deputies could be appointed by their principals because, despite their significant responsibilities, they were subordinate to, and acted as agents of, those principals, and those principals were answerable for their deputies' conduct. Indeed, because at the Founding "[a]ctions were personal, against the individual; damages were a normal remedy; and office-holding carried no special immunity from suit," Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 Yale L.J. 1256, 1334 (2006), these early statutes provided that principals "had to assume personal liability for the misdeeds of their deputies," Jennifer J. Mascott, *Who*

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[4] Founding-era evidence suggests that deputies often carried out these significant responsibilities for extended periods. For example, a letter from President Washington explaining why he appointed the deputy collector of the Port of Baltimore, Daniel Delozier, to the role of surveyor for that district explained that Delozier "acted as Deputy to the Collector—and from the ill health of [the incumbent Collector] appears to have done a great pa[r]t of the business of that department, from the time of its organization." Letter from George Washington to Charles Carroll (of Carrollton) (Aug. 25, 1793), https://founders.archives.gov/documents/Washington/05-13-02-0361.

Are "Officers of the United States"?, 70 Stan. L. Rev. 443, 519 (2018); *see, e.g.*, An Act to Establish the Judicial Courts, ch. 20, § 28, 1 Stat. at 87-88 (providing that "defaults or misfeasances" of deputy marshals "shall be adjudged a breach of the condition of the bond given, as before directed, by the marshal who appointed them"). That principals were liable for their deputies' actions reinforces that the First Congress viewed deputies as mere agents of, and subordinate to, their principals, not as Officers in their own right.

2. The same Act that created the collectors, naval officers, and surveyors (and their deputies) also provided for the employment of weighers, gaugers, measurers, and inspectors. Although these individuals, like deputies, had significant statutory responsibilities, they were originally appointed by collectors, not by the President, a Court of Law, or the Head of a Department.[5]

Collectors were authorized "to employ proper persons as weighers, gaugers, measurers and inspectors at the several ports within his district," and surveyors were authorized to "superintend and direct" them. Act to Regulate the Collection of the Duties, ch. 5, § 5, 1 Stat. at 36-37. Though they worked for collectors and surveyors, these non-Officers had significant responsibilities. With regard to inspectors, the Act provided that collectors, naval officers, and surveyors could "put on board [a] ship or vessel one or more inspectors" who (1) ensured that the ship had a permit for all merchandise it was transporting, (2) entered information about the permits in a book, (3) seized suspicious goods after a certain period of time, (4) "compare[d] the account and entries he ha[d] made of the goods unladen from

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[5] Congress subsequently changed their method of appointment to meet the requirements for inferior officers. *See infra* at 16.

such ship or vessel, with the manifest delivered to the collector," and (5) remained with the boat until any inspection was complete. *Id.* § 15, 1 Stat. at 40-41.

Similarly, the statute provided that every "person specially appointed by" collectors, naval officers, and surveyors "shall have full power and authority, to enter any ship or vessel" he believed to contain illicit goods, to "search for, seize, and secure any such goods," and to get "a warrant to enter such house, store, or other place (in the day time only) and there to search for such goods, and if any shall be found, to seize and secure the same for trial." *Id.* § 24, 1 Stat. at 43. The "person[s] specially appointed" to which the statute referred could only have been the weighers, gaugers, measurers, and inspectors that the Act specifically authorized the collectors to hire and surveyors to direct.

Notably, the Fifth Congress changed the appointment procedure for weighers, gaugers, measurers, and inspectors in 1799 to require "the approbation of the principal officer of the treasury department." An Act to Regulate the Collection of Duties on Imports and Tonnage, ch. 22, § 21, 1 Stat. 627, 642 (1799). No evidence from the time, however, suggests that Congress viewed this change as constitutionally required.[6]

3. The view that government employees who had significant duties but acted as agents of, or were subordinate to, Officers were not themselves constitutional "Officers" persisted well after the First Congress, as state supreme court decisions and congressional reports reflect.

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[6] Nearly a half-century later, Attorney General Hugh S. Legaré opined that permanent inspectors must be appointed as inferior officers, *Appointment and Removal of Inspectors of Customs*, 4 Op. Att'y Gen. 162, 163-64 (1843), but neither Congress nor the Attorney General expressed such a view in 1799.

For instance, an oft-cited 1822 opinion by the Maine Supreme Court concluded that an agent for the preservation of timber on the public lands, appointed by the governor, was not a civil Officer such that the state's Incompatibility Clause would prevent a sitting senator or representative from being appointed to the position. *See Opinions of the Justices*, 3 Greenl. (Me.) 481, 481 (1822); *see also Officers of the United States*, 31 Op. O.L.C. at 83-84 (listing many other courts that "treated this early analysis as authoritative"). The court held that an "office" "implies a delegation of a portion of the sovereign power to, and possession of it by the person filling the office." *Opinions of the Justices*, 3 Greenl. at 482. This power is "a legal power, which may be rightfully exercised, and in its effects it *will bind the rights of others*, and be subject to revision and correction only according to the standing laws of the State." *Id.* (emphasis added). Under this definition, the agent for the preservation of timber on public lands was, according to the Court, not an Officer because he was "clothed with no powers, but those of superintending the public lands, and performing certain acts in relation to them *under the discretionary regulations of the governor*." *Id.* at 483 (emphasis added). In other words, although the superintendent of the public lands surely had significant responsibilities, he was not an "Officer" because he was an "agent" of the governor.

Similarly, a House Judiciary Committee report in 1899 concluded that "the member of a commission created by law to investigate and report, but having no legislative, judicial, or executive powers, was not an officer within the meaning of the constitutional inhibition." 1 Asher C. Hinds, *Hinds' Precedents of the House of Representatives* 604 (1907). The Committee rea-

soned that the "mere power to investigate some particular subject and report thereon, or to negotiate a treaty of peace, or on some commercial subject, and report without power to make binding on the Government, does not constitute a person an officer." *Id.* at 607-08. The commission members in question were "*mere agents* appointed by direction of Congress for the purpose of gathering information and making recommendations for its use if the Congress sees fit to avail itself of the labors of the commission." *Id.* at 608 (emphasis added). The Commissioners had "no power to . . . bind the Government" because "[t]heir suggestions and recommendations have no force; they may or may not be adopted" by the Congress. *Id.* at 610. Moreover, the Committee reasoned that the fact "[t]hat the Senate may feel that it ought to ratify or approve the recommendations of such commission can make no difference, [because] the fact remains that their acts are not binding upon anyone or upon any departments of the Government." *Id.* at 611.

4. Consistent with this longstanding approach, Congress has repeatedly over the last century permitted agencies to use ALJs or their equivalents—employees hired based on merit and not pursuant to the Appointments Clause—to help federal agencies develop administrative records and to make initial findings and decisions. Hearing examiners—the contemporary equivalent of today's ALJs—have existed since the turn of the twentieth century. In one early example, Congress permitted the Interstate Commerce Commission to "employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers." An Act to Amend an Act Entitled "An Act to Regulate Commerce," ch. 3591, § 7, 34 Stat. 584, 594-95 (1906). The

statute did not require that hearing examiners be appointed in the manner prescribed by the Appointments Clause. *Id.*

Even more apposite here, in 1946 Congress passed the Administrative Procedure Act, which maintained and updated the position of hearing examiner. At that time, Congress recognized that "agencies [had] such a volume of business, including cases in which a hearing is required, that the agency heads, the members of boards or commissions, can rarely preside over hearings in which evidence is required." *Ramspeck v. Fed. Trial Exam'rs Conf.*, 345 U.S. 128, 130 (1953). Thus, the APA provided that "[s]ubject to the civil-service and other laws . . . , there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings . . . , who shall be assigned to cases in rotation so far as practicable." Pub. L. No. 79-404, § 11, 60 Stat. at 244.

Although the legislative history is ambiguous with respect to how these hearing examiners were to be appointed and whether their appointment outside the process prescribed by the Appointments Clause was seen as raising constitutional concerns,[7] the final text

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[7] *Compare* Administrative Procedure in Government Agencies, S. Doc. No. 77-8, at 47 (1941) (report of a committee appointed by the Attorney General recommending that hearing examiners be appointed by the Office of Federal Administrative Procedure, which would investigate an examiner's "judicial qualifications and capacity" and have "full power to approve and appoint or disapprove and refuse to appoint persons nominated by an agency" without discussing any constitutional concerns), *with* Administrative Procedure Act, Legislative History, S. Doc. No. 79-248, at 42 (1944-46) (Senate report noting that a proposal in which the Office of Administrative Justice appoints hearing examiners may raise constitutional difficulties because it "is a committee and not

of the enacted law did not require that they be appointed in conformity with the Appointments Clause. Rather, the text required that they be "qualified and competent." *Id.* Moreover, they were "given independence and tenure within the existing Civil Service system," and Congress "vest[ed] control of their compensation, promotion and tenure in the Civil Service Commission to a much greater extent than in the case of other federal employees." *Ramspeck*, 345 U.S. at 132; *see id.* at 133 (describing hearing examiners as "classified Civil Service employees").[8] Early regulations implementing the Act provided that "the regulations for appointment to the competitive system . . . shall apply to appointments to hearing examiner positions." 5 C.F.R. § 34.4 (1949); *see, e.g.*, *id.* § 2.109 ("Upon receipt of a request for certification of eligibles, there shall be certified . . . a sufficient number of names to permit the appointing officer to consider three eligibles in connection with each vacancy.").

In 1962, Congress permitted the SEC to use these hearing examiners—who were hired competitively and not pursuant to the Appointments Clause—to assist in completing the Commission's many responsibilities. A proposal submitted by the President to Congress recommended that Congress permit the Commission to delegate some of its responsibilities to employees "for greater flexibility in the handling of the business before the Commission, permitting its disposition at different levels so as better to promote its efficient dispatch." 1961 U.S.C.C.A.N. 1351, 1351. Thus, in An

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a court and hence may not be within the constitutional authorization for appointing powers").

[8] In 1978, the Commission was replaced by the Office of Personnel Management, the Merit Systems Protection Board, and the Federal Labor Relations Authority. *See* Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 201, 92 Stat. 1111.

Act to Authorize the Securities and Exchange Commission to Delegate Certain Functions, Pub. L. No. 87-592, 76 Stat. 394, 394-95 (1962), Congress provided that "the Securities and Exchange Commission, . . . shall have the authority to delegate, by published order or rule, any of its functions to a division of the Commission, an individual Commissioner, a hearing examiner, or an employee or employee board." Congress, however, ensured that the Commission retained the "discretionary right to review the action of any such division of the Commission, individual Commissioner, hearing examiner, employee, or employee board, upon its own initiative or upon petition of a party to or intervenor in such action." *Id.*

In 1978, the term "administrative law judge" was substituted for "hearing examiner." *See* An Act to Amend Title 5, United States Code, Pub. L. No. 95-251, § 2, 92 Stat. 183 (1978). Later that year, Congress specifically codified the requirement that ALJs be required to undergo "competitive examinations" by the Office of Personnel Management before joining the "competitive service." Pub. L. No. 95-454, § 201, 92 Stat. at 1120; *see* 5 C.F.R. § 930.201(d)-(e). Otherwise, the statutory scheme remains the same today.

In short, both the President and Congress agreed that hearing officers and later ALJs should be assigned significant responsibilities to assist the Commission in carrying out its duties. Notwithstanding that, ALJs have never been statutorily required to be appointed by the President, a Court of Law, or the Head of a Department.

* * *

This history demonstrates that, although Congress must wield its power to shape the government in a

manner consistent with the Appointments Clause's requirements, those requirements allow Congress great flexibility in determining how federal employees are hired. From the deputies and customs employees in the First Congress, to hearing officers in the last century, there have been many government employees who exercised significant responsibilities, but were not required to be appointed as constitutional "Officers." Importantly, each of these non-Officers acted as the agent of, or subordinate to, an Officer, and it was the Officer—not the subordinate agent—who was accountable for the agent's actions. As the next section demonstrates, ALJs at the SEC are no different.

III. SEC ADMINISTRATIVE LAW JUDGES ARE NOT CONSTITUTIONAL OFFICERS AND THUS NEED NOT BE APPOINTED IN CONFORMITY WITH THE APPOINTMENTS CLAUSE.

1. ALJs act as agents of, and are subordinate to, the Commissioners of the Securities and Exchange Commission, and their initial decisions never become binding without the Commission's express order. They are therefore not constitutional "Officers of the United States," and need not be appointed by the President, a Court of Law, or the Head of a Department.

As noted earlier, this Court has held that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States.'" *Buckley*, 424 U.S. at 126. In delineating the boundaries of this definition, the Court has reasoned that non-Officers "are lesser functionaries subordinate to officers of the United States" and "subject to the control or direction of any other executive, judicial, or legislative authority." *Id.* at 126 n.162; *see also Tucker v. Comm'r*, 676 F.3d 1129, 1134 (D.C. Cir.

2012) (employees are not "Officers" where they are "subject to consultation requirements, to guidelines, and to supervision"). Other authorities have similarly reasoned that "Officers of the United States" are only those who have "power lawfully conferred by the government to *bind third parties*, or the government itself, for the public benefit," *Officers of the United States*, 31 Op. O.L.C. at 87; *see* 1 *Hinds' Precedents* at 610 (non-Officers may not "bind the Government").

ALJs are lesser functionaries "subject to the control" of the SEC and do not have the power in their own right to bind third parties or the government. Though ALJs conduct hearings, their "initial decisions" are not final, let alone binding. *See* 17 C.F.R. § 201.360(a)(1) & (d). Once the ALJ issues an initial decision, "a party or an aggrieved person [may] timely file[] a petition for review or a motion to correct a manifest error of fact in the initial decision," *id.* § 201.360(d)(1), which the Commission always grants, *see* App. 89a. The Commission may also "on its own initiative order[] review of a decision." 17 C.F.R. § 201.360(d)(1). Even when an aggrieved party or person fails to file a timely petition for review and the Commission does not order a review on its own initiative, the Commission must "order that the decision has become final as to that party," and "[t]he decision becomes final" only "upon issuance of the order" by the Commission. *Id.* § 201.360(d)(2). Put differently, "ALJs' initial decisions . . . do not become the final and effective decision of the agency without affirmative action on [the Commission's] part—specifically, [its] issuance of a finality order."

App. 90a n.109; *see id.* at 90a ("no initial decision becomes final simply 'on the lapse of time' by operation of law").[9]

Moreover, the Commission reviews the initial decisions of ALJs *de novo*. *Id.* at 91a. The Commission "may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record." 17 C.F.R. § 201.411(a). It also may, "[u]pon its own motion or the motion of a party, . . . allow the submission of additional evidence." *Id.* § 201.452. In short, "although ALJs may play a significant role in helping to shape the administrative record initially, it is the Commission that ultimately controls the record for review and decides what is in the record." App. 91a.

Finally, "[b]ecause the Commission is not bound in any way by its ALJ's decisions, . . . the blame for its

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[9] Petitioners and the United States argue that "[i]n about 90% of cases . . . the ALJ's initial decision 'become[s] final without plenary agency review,'" Pet'rs Br. 32 (quoting *Bandimere*, 844 F.3d at 1180 n.25); *see* U.S. Br. 22, but a recent study by a current SEC Commissioner examined all SEC ALJ decisions from 2014 to 2015 and found that "[f]ully 80 percent of the ALJ decisions during that period were *default* decisions" in which the respondent did not appear. Robert J. Jackson, Jr., *Fact and Fiction: The SEC's Oversight of Administrative Law Judges*, The CLS Blue (Mar. 9, 2018), http://clsbluesky.law.columbia.edu/2018/03/09/fact-and-fiction-the-secs-oversight-of-administrative-law-judges/. "In the rest of the cases, the respondent appeared," but "chose not to ask the commission to review the case." *Id.* Indeed, so far as that Commissioner is aware, "the only proceeding . . . during this time period where review of an ALJ's decision was timely sought and the commission refused review was one in which the SEC's own enforcement division made the request." *Id.* (emphasis omitted).

unpopular decisions will fall squarely on the commissioners and, in turn, the president who appointed them." *Bandimere*, 844 F.3d at 1198 (McKay, J., dissenting). The relevant statute permits "[a]ny person aggrieved by *an order of the Commission* [to] obtain a review of such order in the court[s] of appeals of the United States." 15 U.S.C. § 77i(a). In other words, in the same way that marshals and customs officers created by the First Congress were liable for their deputies' misdeeds, only orders of the Commission—the only orders that have any binding effect—may form the basis of a challenge in an Article III court.

As this Court has suggested, then, ALJs at the SEC "possess purely recommendatory powers." *Free Enter. Fund*, 561 U.S. at 507 n.10; *cf. Attorney General's Manual* at 83 (agencies are "in no way bound by the decision" of ALJs and "retain[] complete freedom of decision—as though [they] had heard the evidence [themselves]"). For that reason, they are quintessentially "lesser functionaries subordinate to officers of the United States," *Buckley*, 424 U.S. at 126 n.162—namely, the Commissioners of the SEC. Moreover, because an initial ALJ decision does not become final without the *de novo* review of and order by the Commission, ALJs do not themselves have the power "to bind third parties, or the government itself, for the public benefit," *Officers of the United States*, 31 Op. O.L.C. at 87.

Petitioners' theory rests heavily on this Court's decision in *Freytag*, but that case is not to the contrary. There, the Court held that special trial judges of the Tax Court were "inferior Officers" in part because of "the significance of the duties and discretion that special trial judges possess." 501 U.S. at 881. But part of the reason special trial judges enjoy significant discretion is because the Tax Court is required to defer to a

special trial judge's fact and credibility findings unless they are "clearly erroneous." *Landry v. Fed. Deposit Ins. Corp.*, 204 F.3d 1125, 1133 (D.C. Cir. 2000); *see* Tax Ct. R. 183(d) ("the findings of fact recommended by the Special Trial Judge *shall* be presumed to be correct" (emphasis added)). At the SEC, by contrast, the Commission reviews all of an ALJ's factual findings *de novo*. *See supra* at 24. Moreover, it was important to the *Freytag* Court that in the case of declaratory judgment proceedings and limited-amount tax cases, special trial judges "render[ed] the decisions of the Tax Court" with no subsequent order or sign off from a higher official. *Freytag*, 501 U.S. at 882. Thus, the special trial judges exercised precisely the type of "independent authority," *id.*, that ALJs at the SEC do not have.

Notably, the facts of *Freytag* contrast starkly with the facts here. In *Freytag*, although the special trial judge presided over a two-year trial, including 14 weeks of complex financial testimony and 3,000 exhibits, the special trial judge's decision was filed as the Tax Court's decision on the same day the Tax Court received the trial judge's report, suggesting essentially no review or oversight of special trial judges whatsoever. *See Bandimere*, 844 F.3d at 1195 (McKay, J., dissenting). By contrast, here, the ALJ issued an initial decision, the Commission remanded the case for further findings of fact, the ALJ issued a revised initial decision, the Commission granted review, and on an independent review of the record and in a detailed opinion the Commission found that Petitioners committed anti-fraud violations. App. 8a-9a.

Petitioners also attempt to analogize ALJs to court commissioners, the predecessors of magistrate judges, whom the Court held were inferior Officers in *Go-Bart Importing Company v. United States*, 282 U.S. 344,

352 (1931). *See* Pet'rs Br. 20. But court commissioners performed a variety of significant duties that could bind third parties. They were empowered under federal statute, among other things, "to arrest and imprison, or bail, for trial," "to issue warrants for and examine persons charged with being fugitives from justice," "to hold to security of the peace and for good behavior," "to issue search warrants," "to take bail and affidavits in civil causes," "to discharge poor convicts imprisoned for non-payment of fines," "to institute prosecutions under laws relating to the elective franchise and civil rights and to appoint persons to execute warrants thereunder," and "to enforce arbitration awards of foreign consuls in disputes between captains and crews of foreign vessels." *Go-Bart*, 282 U.S. at 353 n.2 (citations omitted). ALJs do not come close to having this panoply of significant powers; to the contrary, as previously explained, ALJ initial decisions have no power to bind third parties in their own right.

In short, although ALJs certainly have been granted important responsibilities by the Commission to aid the Commission's work, they do not "exercis[e] significant authority pursuant to the laws of the United States" for purposes of Article II. Thus, they may be hired through a merit-based system, rather than in the manner prescribed by the Appointments Clause.

2. Were this Court to conclude otherwise, the disruption to the operations of the federal government could be substantial. This Court has repeatedly insisted that the vast majority of civil servants in the federal government do not qualify as constitutional "Officers." *See supra* at 9. That is because, though many civil servants have significant responsibilities and exercise substantial discretion on a day-to-day ba-

sis, they are agents of, or otherwise subordinate to, Officers and therefore do not "exercis[e] significant authority" for Appointments Clause purposes. "Our government in fact depends on such delegation of responsibility, and it does not offend the Appointments Clause so long as the duly appointed official has final authority over the implementation of the governmental action." *Andrade*, 824 F.2d at 1257.

Petitioners and their *amici*, however, would have this Court adopt a much broader test, suggesting that any civil servant who has "substantive and procedural powers that require the exercise of broad discretion" is an "Officer" and must be appointed in conformity with the Appointments Clause. Pet'rs Br. 21; *see* Br. of *Amici Curiae* Scholars of Corpus Linguistics 19 (the term "Officer of the United States" "applie[s] broadly to all government employees—'civil and military'—exercising any non-trivial federal authority"); Br. of Professor Jennifer L. Mascott as *Amicus Curiae* in Supp. of Pet'rs 2 ("Officer" encompasses "every federal civil official with ongoing responsibility to carry out a statutory duty"). These definitions, which focus on the day-to-day discretion of government workers rather than whether or not they independently bind third parties or act as agents of, or subordinate to, other Officers, have the potential to sweep in all sorts of civil servants.[10]

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[10] Notably, Petitioners' theory would invalidate appointments allowed by the First Congress. For instance, under Petitioners' theory, deputy marshals would have been required to be appointed as Officers because they carried out the same significant responsibilities that marshals did. Similarly, inspectors were delegated significant duties by the First Congress, and under Petitioners' theory, those job duties alone would make them constitutional "Officers."

For one thing, though only five ALJs work at the SEC, there are thousands of other ALJs working throughout the federal government. *See Free Enter. Fund*, 561 U.S. at 542 (Breyer, J., dissenting); *see also* Administrative Law Judges, Office of Pers. Mgmt., https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency (last visited Mar. 28, 2018). The Social Security Administration alone employs 1,655 ALJs, while dozens more ALJs assist agencies as varied as the Federal Mine Safety and Health Review Commission, the Department of Labor, and the Office of Medicare Hearings and Appeals at the Department of Health and Human Services. *Id.* Many of these ALJs have responsibilities similar to those of SEC ALJs. *See Bandimere*, 844 F.3d at 1199 (McKay, J., dissenting). In addition, more than 3,000 administrative judges, who lack the independence of ALJs but perform similar functions, also populate the Executive Branch. *See generally* Kent Barnett, *Against Administrative Judges*, 49 U.C. Davis L. Rev. 1643, 1652-62 (2016).

If Petitioners' theory is correct, "every losing party before an ALJ [might] now have grounds to appeal on the basis that the decision entered against him is unconstitutional[.]" *Free Enter. Fund*, 561 U.S. at 543 (Breyer, J., dissenting). Indeed, "Appointment Clause problems may exist even in . . . agencies where the agency head does select the ALJs, given [the Office of Personnel Management's] role in limiting the pool of ALJ candidates and the fact that some agency heads may not qualify as department heads for constitutional purposes because their agencies are nested within bigger administrative entities." Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1, 20 n.99 (2017).

Though there may be ways to distinguish among different types of ALJs or other administrative judges, a ruling for Petitioners would at least open the door to constitutional challenges from nearly everyone who is regulated by an administrative agency, swamping courts and destabilizing the government's ability to function.

Moreover, Petitioners' definition of "Officer" would seemingly include other federal employees who have never been considered Officers. For example, there are 3,684 career employees in the Senior Executive Service who have significant responsibilities, but are subordinate to Officers. *See* S. Comm. on Homeland Sec. and Gov't Affairs, 114th. Cong., *Policy and Supporting Positions* 216 (Comm. Print 2016), http://www.fdsys.gov; *see id.* at 217-18 (describing the merit-based hiring of these career employees). If these career positions were considered Offices under the Appointments Clause, the individuals filling those positions would have to be appointed by Presidential nomination and Senate confirmation, until and unless Congress said otherwise. This would be a revolutionary change in how the government functions.

On top of this, Petitioners' theory threatens to eliminate the dual layer of removal protection afforded to ALJs and other civil servants who have significant responsibilities because this Court has held that "dual for-cause limitations on the removal" of some inferior Officers violates the constitutional separation of powers. *Free Enter. Fund*, 561 U.S. at 492. Under federal law, ALJs may be removed by the Merit Systems Protection Board only for good cause, *see* 5 U.S.C. § 7521(a), (b), and members of the Merit Systems Protection Board may be removed "only for inefficiency, neglect of duty, or malfeasance in office," *id.* § 1202(d). This, of course, is a common way to structure how civil

servants in independent agencies can be removed. *See Free Enter. Fund*, 561 U.S. at 540-52 (Breyer, J., dissenting) (listing examples). But Petitioners' theory throws into doubt the constitutionality of these long-standing removal provisions and contravenes this Court's warning not to "cast doubt on the use of what is colloquially known as the civil service system within independent agencies," *id.* at 507 (majority opinion).[11]

In short, on top of rowing against centuries of practice in which Congress has chosen how government employees who are agents of, or subordinate to, Officers should be hired, Petitioners' theory threatens to destabilize the modern federal government and throw into doubt the constitutionality of how thousands of civil servants who work in every corner of the federal government are hired. Given that dramatically expanding the number of appointments that must be made in conformity with the Appointments Clause will significantly undermine the federal government's ability to function, efforts to minimize that disruption will

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[11] The United States argues that this Court should decide this removal question now, even though the Court was specifically asked to grant *certiorari* on it and declined to do so. Contrary to the views of the United States, that question is not "fairly encompassed" in the question this Court did grant, U.S. Br. 39 n.7, because dual for-cause limitations on removal may be permissible for some inferior Officers, *see Free Enter. Fund*, 561 U.S. at 507 n.10. Put differently, whether ALJs are "Officers" is a separate question from whether their removal protections "interfere impermissibly with [the President's] constitutional obligation to ensure the faithful execution of the laws," *Morrison v. Olson*, 487 U.S. 654, 692-93 (1988), and this Court should not decide that question without full briefing on the meaning of "good cause," whether "good cause" limitations on SEC ALJs "interfere impermissibly with [the President's]" Take Care obligations, and other related questions.

inevitably lead to *pro forma* appointments, thereby undermining the accountability goals that animate the Clause.

Rather than go down that path, this Court should reaffirm that "lesser functionaries subordinate to officers of the United States" and "subject to the control or direction of any other executive, judicial, or legislative authority" are not "Officers of the United States," *Buckley*, 424 U.S. at 126 n.162.

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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[12] Institution names are provided for purposes of affiliation only.